**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| Federal-State Joint Board on Universal Service | ) | CC Docket No. 02-6 |

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Office of the Secretary
Federal Communications Commission
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Washington, DC 20554

**Reply Comments on the Second Further Notice of Proposed Rule-Making**
**Released on December, 23, 2003**

Funds For Learning, LLC, an educational technology consulting firm that has focused its practice on the E-rate program since the program's inception in 1997, appreciates this opportunity to respond to comments filed in connection with the Federal Communications Commission's Notice of Proposed Rule-Making referenced above.

We believe that program stakeholders have supplied the Commission with a wide range of perspectives on how the E-rate program could be improved and how the potential for waste, fraud and abuse could be addressed. In evaluating these comments, we encourage the Commission to recognize that E-rate program stakeholders will inevitably have disparate views on whether a proposed rule is "a good idea." What will seem like a reasonable control to one stakeholder group may appear to be a burdensome record-keeping requirement to another. And, as we noted in our first round of comments,

some changes will inevitably create "winners" and "losers." The Commission's ultimate goal should always be to adopt only those rules and regulations that are essential to achieving the policy goals that Congress laid out for the Schools and Libraries Support Mechanism.

One of our principals had the privilege of serving on the Schools and Libraries Division's Task Force on the Prevention of Waste, Fraud and Abuse. We applaud the Commission for moving forward to seek comments on so many of the recommendations that the Task Force submitted. It should be noted that the Task Force recommendations represented a true consensus of steps that members believed could—or should—be taken to address concerns about waste, fraud and abuse. Before the Task Force considered a single proposal, its members agreed that for any recommendation to move forward, it would have to be supported by at least 10 out of the Task Force's 14 members and opposed by no more than two members. Because some Task Force members wanted to be able to support recommendations that might be opposed by their stakeholder group, the Task Force also agreed not to publicize the specific votes that were taken. As such, we believe that the Task Force recommendations provide the best road map to the consensus among program stakeholders for how best to address concerns about waste, fraud and abuse in ways that *will not undermine the program's goals and burden applicants and stakeholders unnecessarily.*

We underscore that point because since our initial comments were filed, we have become increasingly aware of ways in which it appears that the program is becoming paralyzed by new mechanisms to address waste, fraud and abuse. When the approval of a school district's funding requests are held up for months because of an unsubstantiated allegation against a vendor (possibly even submitted anonymously by a competitor), the result is to inhibit the very competition that the program seeks to promote. When small businesses must wait months for their invoices to be reviewed and paid—often because they were forced to change rapidly evolving product model numbers because of the passage of time—many of them are forced to drop out of the program because they can no longer afford to absorb indefinitely the discounted costs of the work they performed in

good faith. When program participants take pains to complete and submit an application form that has been reviewed and approved by the Office of Management and Budget, and then are subjected to additional questions and requests for additional documentation that go far beyond the paperwork burdens that the government approved, the overall process may need to be reviewed and modified.

The Commission must ensure that any new standard or review is imposed in a way that is fair, timely, provides due process and does not further delay the process of approving applications or payments. We believe that program delays are the root cause of many of the problems now associated with the E-rate program: They contribute to the growing gap between approved commitments and disbursements, and they generate an ever-cascading flood of additional paperwork requirements and compliance issues.

The longer the delay, the greater the chances:

- that technology will change and a Service Substitution letter must be submitted and reviewed;
- that a school district's technology needs will have changed and a Service Substitution must be submitted and reviewed;
- that a school district has moved into a new budget cycle and it will have trouble proving that when it applied, it did, in fact, expect to have the necessary funds to cover its portion of the costs;
- that a company will have merged or gone out of a business and a SPIN change must be submitted and reviewed;
- that a contract will have expired and a Form 500 must be submitted and reviewed,
- that an installation deadline may be jeopardized, and so forth.[1]

[1] A good example of how these delays can intertwine was provided in an April 9, 2004, letter from USAC General Counsel D. Scott Barash to the Commission. This forwarded a request for an installation deadline waiver from the Moreno Valley Unified School District. In this case, by the time the school district received approval for a 1999 funding request, on April 29, 2002, it could no longer cover its portion of the project's cost in its budget for 2002-03 because of the impact of state budget cuts. And because its fiscal 2003-04 budget did not take effect until July 1, 2003, that did not leave enough time to complete the work by the new installation deadline of Sept. 30, 2003.

Each time one of these events occurs, it creates a new form and a new hurdle to the process. And each new step increases the chances that a program regulation will unwittingly be violated or a deadline missed.

Interestingly, commenters appear to be divided as to whether certain kinds of changes should be made at all. Some support a change as an improvement; others are wary of supporting such "improvements", fearing that any change will mean yet another process or application for schools and libraries to master, and yet another opportunity for them to make a mistake that will jeopardize their discounts.

In reviewing potential changes, the Commission should consider whether, in some instances, it can preserve two tracks. For instance, if the Commission decides to make changes to the Form 470 or Form 471 applications to facilitate program improvements, it should review whether it must require applicants to adapt to the new system, or whether it could provide a longer phase-in period. In the past, the Commission has adopted a "no excuses" approach when new forms were approved within days of their required use. This has led to the rejection of many applicants' requests, not because they violated program rules, but because they did not use the right form or master the new procedure. As the Commission tries to encourage an ethic of strong program compliance, it should at the same time consider the message it sends when it adopts rigid application-processing policies in the name of controlling the program's administrative costs rather than in the name of common-sense enforcement of the rules.

**Unsubstantiated 30% Rule**

We support the position of the State E-rate Coordinators' Alliance on the SLD's decision to expand the interpretation of the so-called "30 percent rule" as a basis for rejecting "unsubstantiated requests."[2] Because of delays in application review, an applicant may be called on to justify its initial funding requests more than a year after they were submitted. The new policy encourages applicants to continue to defend funding

[2] State E-rate Coordinators' Alliance (SECA) Comments at p. 17.

requests that they now know may be too large because by acknowledging that they no longer need that much money, they may jeopardize their funding if their request is now found to be "unsubstantiated" Clearly, it's important for applicants to submit requests that are reasonable. On the other hand, applicants have *never* been given guidance on the expected standard for substantiating and projecting variable costs such as those for traditional telecommunications services. Applicants should be encouraged to work with the Program Integrity Assurance to reduce requests that can no longer be defended without fear that by doing so, their requests will be rejected if their reduced request is more than 30 percent less than their original one.

**Adjusting Funding Commitments Upward for Clerical Mistakes**

SECA correctly notes that because the program does not allow applicants to revise funding commitments upward, the program does not exhibit a "sense of fairness." [3] We appreciate that the program's administrators cannot give applicants *carte blanche* to revise their funding requests upward or the fund administrator would never be able to issue a funding commitment for internal connections. However, we believe that the fund administrator could make a provision under which applicants would be permitted to revise their commitments upward for a limited period of time after receiving their Receipt Acknowledgement Letter. According to the SLD, more than 90 percent of Form 471 applications are now filed online, meaning that RALs for the vast majority of applications are issued within a matter of weeks of the filing deadline—and usually before the SLD now issues its annual projection of the funding demand.

We endorse the suggestion of Kellogg and Sovereign Consulting that the Commission permit funding requests to be revised upward within three weeks of the Receipt Acknowledgement Letter when a clerical error can be demonstrated.[4] As these consultants note, "In any program, if the participants believe that the rules are fair, the participants will be willing to play by the rules. If they believe the rules to be unfair, then the participants will look for ways to circumvent the 'unfair' rules." It is puzzling why

[3] SECA comments at p. 18
[4] Kellogg & Sovereign Consulting comments at p. 19.

the Commission decided last December to give a number of school districts a "second chance" to rectify apparent mistakes in competitive bidding—the bedrock of the E-rate application program—but has so far has not permitted one of these same school districts to rectify a clerical error in an earlier funding year that it had tried to correct on a very timely basis.[5]

**Regulation of Consultants**

Several commenters urged the Commission not to require persons who provide free advice to applicants to register with the SLD or to be named on the applicant's forms. We believe that these comments demonstrate the inherent challenges involved in trying to regulate persons who supply application support, whether paid or unpaid.

We are sympathetic to the arguments of state coordinators who want to be able to continue to provide free advice to help their schools and libraries prepare their E-rate applications.[6] At the same time, we believe that experience has shown that most of the "problems" associated with E-rate consultants occurred when the consultants were either paid by vendors who won the jobs, or when consultants rolled application services into other professional services that were tied to making technology choices on behalf of schools. Further, there are cases where the organization that provides the free services, such as a statewide consortium or regional educational service agency, may also provide services that are eligible for E-rate discounts.

Thus, we encourage the Commission to make sure that any new requirements that are adopted in this area truly address the specific situations that have been a cause for concern. An appropriate exception could be made for those who provide E-rate advice in

[5] On January 16, 2003, Funds For Learning filed an appeal to the full Commission and a request for waiver on behalf of the Oklahoma City Public Schools, which are still pending. The issue involved a correction of a clerical error on a 2001 funding request that the district tried to correct and revise upward *before* it had even received its Receipt Acknowledgement Letter. As this appeal made clear, the school district had met several tests that, if adopted, would ensure that a policy change in this area would not impact the overall program in a negative way. As this filing noted, "Unlike the vast majority of other E-rate appeals cases that the FCC is called on to review, the applicant in this instance violated no competitive bidding rule, missed no deadline, requested no ineligible services, and responded to every question that was put before it by the SLD."

[6] See, for example, Comments of the Arkansas E-rate Work Group at p. 5.

their roles as government employees, but not for those who provide other kinds of "free" advice. We also urge the Commission and the SLD to clarify their expectations for persons who provide E-rate consulting or application advice from the start, and not impose a new standard retroactively.

**Form 470 Posting Process**

Some commenters opposed requiring the Form 470 to be posted in certain kinds of situations, while many other commenters acknowledged the value of a centralized competitive bidding process. As the Commission itself noted in its *Ysleta* decision "…Competitive bidding for services eligible for discount is a cornerstone of the E-rate program, vital to limiting waste, ensuring program integrity, and assisting school and libraries in receiving the best value for their limited funds. . . ."[7] As described in our earlier comments, we urge the Commission to review ways to better marry the national procurement requirements embodied in the Form 470 application with traditional state and local procurement rules to create a system that preserves the best of both approaches.

In our initial comments, we urged the Commission to abandon the notion that a Form 470 application was linked to a particular funding year, since it is more correctly linked to the RFP that resulted in a contract, no matter what time of year that occurs. This position only leads to confusion about program rules, as reflected in the comments of On-Tech. This company asserted that "the Form 470 . . . forces applicants to conduct the RFP inside the filing window, rather than at a time that is appropriate for the project."[8] As one of On-Tech's underlying assumptions is incorrect, namely that a Form 470 (and corresponding RFP) must be filed "inside the filing window," its assessment that the Form 470 "adds nothing to the process," should be viewed with some skepticism.

Specific objections to the Form 470 posting process typically have included these complaints:

- "We get no responses."

[7] Commission's decision in the appeal by the Ysleta Independent School District, December 4, 2003, at p. 12.
[8] On-Tech comments at p. 8

- "There is no telecommunications competition in my area."
- "We get *too many* responses because it is too easy for companies to find our name."
- "We are encouraged to buy off a state contract, but the state contract was not bid under the E-rate rules so we have to pretend to conduct our own competition."
- "The Form 470 process forces me to accept a bidder that may not be a local company and may be unable to service my needs."

By now, the SLD and program stakeholders are well aware of issues like these that may undermine the effectiveness of the Form 470 process. We believe that if given the opportunity, a task force of experienced stakeholders could make more specific recommendations to the FCC on how to best modify the Form 470 application process so that it continues to promote competitive bidding in cases where substantial choices and dollars are at stake; bring program requirements into greater conformity with state and local bidding practices; and relieve applicants seeking *de minimus* amounts of funding from some of these paperwork requirements.

**Summary**

We appreciate the Commission's efforts to look for ways to address concerns associated with waste, fraud and abuse in the E-rate program, and to streamline the program's operations. As always, we encourage the Commission to move as quickly as it can to implement the changes it decides to make. It is useful for stakeholders to know which potential rule changes will *not* be implemented for a particular funding year as the application cycle for that funding year approaches. For instance, if the Commission ultimately decides that it cannot make a decision—or does not want to make a decision—on revising the discount matrix for the 2005 funding year, it would be helpful for E-rate stakeholders to know that as soon as possible. Similarly, as we noted previously, E-rate applicants need additional guidance as soon as possible on how the Commission intends to implement its new "two-out-of five years" rule regarding the funding of internal connections.

We assert again, as we have before, that the vast majority of E-rate applicants truly want to follow the rules—but they desperately need clarity in understanding what those rules are and, from the outset, how they will be enforced.

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